No. 892

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15,889.

WILLIAM F. ADAMS,
Appellant,

vs.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama, Western Division.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES.

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Case Cited.

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Textbook Cited.

3 Moore's Federal Practice 3418..... 3
3 Moore's Federal Practice 3422..... 5

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15,839.

WILLIAM F. ADAMS,
Appellant,

vs.

AUTHERINE J. LUCY and POLLY ANNE MYERS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama, Western Division.

PETITION FOR REHEARING.

Appellant respectfully petitions the Court to set aside its opinion and vacate its judgment entered in this case on December 30, 1955, and to grant a rehearing. Appellant shows that this Court erred in its said opinion and judgment in the following particulars:

(1)

In affirming the holding of the District Court that this action is properly brought as a class action under Rule 23 (a), Federal Rules of Civil Procedure.

(2)

In affirming the judgment of the District Court enjoining the defendant (appellant), his servants, agents, assistants, and employees, and those who might aid, abet, and act in concert with him, from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color and, particularly, that portion thereof which includes within the scope thereof "others similarly situated."

Under Proposition V of the brief of argument, in the brief filed on behalf of appellant on the appeal of this case, there are cited authorities which, it is submitted, sustain the proposition that the plaintiffs were not entitled to have this suit maintained and adjudicated as a class action. Argument in support of such proposition is contained on pages 41-55 of said brief. After the printing of said brief, there was brought to the attention of counsel for appellant the opinion of this Court, dated October 26, 1955, granting a rehearing in the case of **Board of Supervisors of Louisiana State University and Agricultural and Mechanical College v. Alexander P. Tureaud**, 226 F. 2d 714, to which reference was made by counsel for appellant in the oral argument at the time of the submission of this case on appeal. In said opinion of this Court, there are contained the following statements:

> "In this record, there is no proof to sustain the allegation that there are many others besides complainant, too numerous to make parties, having the identical status and possessing the necessary qualifications for admission to the same college and courses. Certainly there can be no such all-inclusive injunction covering all members of an alleged class without proof that the others desire to be so represented in substantial numbers or have requested plaintiff so to represent them. Such facts cannot be assumed. 3 Moore's

Federal Practice, 3418 et seq.; Rule 23, Fed. Rules Civ. Proc., 28 U. S. C. A.; Weeks v. Bareco Oil Co., 7 Cir., 125 F. 2d 84."

In its opinion in the **Tureaud** case, dated January 6, 1956, this Court, in affirming the order of the District Court appealed from, based its action on "the reasons stated in the majority and concurring opinions of the court dated August 23, 1955," in which no reference is made to the propriety of the class action feature of the order of the District Court. It is, therefore, submitted that there has been no express revocation by this Court of the above quoted principle contained in its opinion in the **Tureaud** case, dated October 26, 1955.

It is submitted that the above quoted principle contained in the opinion of this Court in the **Tureaud** case, dated October 26, 1955, is in all material respects identical with the proposition contained in the brief filed on behalf of appellant on the appeal of this case, that the plaintiffs were not entitled to have this suit maintained and adjudicated as a class action. It is submitted that in the record on this appeal there was no proof to sustain the allegation contained in the complaint as last amended (R. 36) to the effect that there are "other Negroes similarly situated with respect to the matters here involved—so numerous as to make it impracticable to bring them all before the court—there being common questions of law and fact . . ."

In 3 Moore's Federal Practice 3418 et seq., cited by this Court in its opinion in the **Tureaud** case, dated October 26, 1955, the following statements appear:

> "By definition, an essential prerequisite to a class action is the existence of a 'class' " (p. 3418).
>
> . . . . . .
>
> "Neither the multiplicity of parties, nor the inexpediency, nor the inconvenience of bringing parties before the court will, in themselves, justify the class

suit; they are, however, matters which evidence impracticability. A reading of the cases convinces one that whether a number is so large that it would be impracticable to join all the parties is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding the case; **and there must be a positive showing of such circumstances.**" (Emphasis added.) (p. 3422.)

. . . . . .

"**An action, of course, is not a class suit merely because it is designated as such in the pleadings; whether it is or is not depends upon the attending facts.**" (Emphasis added.) (p. 3423.)

On pages 51-53 of the brief filed on behalf of appellant on this appeal, comment is made on the evidence contained in the record on appeal reflecting on the existence of a class or of "other Negroes similarly situated—so numerous as to make it impracticable to bring them all before the court." In reply thereto, on page 16 of the brief filed on behalf of appellees, the following statements are made:

". . . the defendant himself testified that other Negro students have applied for admission (R. 93). Hill Ferguson, a member of the Board of Trustees of the University of Alabama, testified that other Negro students have applied 'from time to time **in the last 15 or 20 years**' (R. 70). This defendant wrote one applicant, 'I am venturing to write you a friendly letter to tell you frankly that the problem posed by your application is one of which we have long been conscious and which we have from time to time been called upon in the past to meet' (R. 156). There is no evidence that any of the applicants have ever been admitted." (Emphasis added.)

It is submitted that in so summarizing the evidence reflecting on the existence of a class, counsel for appellees

undertook to do so in a manner most favorable to their contention that a class existed. It is submitted, however, that the inconclusiveness of such summarization is demonstrated in the final sentence thereof, in which it is stated that "there is no evidence that any of the applicants have ever been admitted." But, as shown in the above-quoted excerpt from 3 Moore's Federal Practice 3422, "**there must be a positive showing of such circumstances.**" Certainly, the burden imposed on appellees, of a positive showing of the existence of a class, was not met by the lack of evidence that any Negro who had applied for admission had been admitted. Certainly, the burden imposed on appellees, by the averments in the complaint as last amended, to show the existence of a class of which they were represented members, could not be shifted to appellant by imposing on him the burden of showing that no such class existed.

On page 16 of the brief filed on behalf of appellees on this appeal it is stated:

> "To require plaintiffs to prove that the class is numerous would place on plaintiffs an unnecessary burden, since that is obvious from the facts and circumstances of this case, and an impossible burden since the large Negro population of the state makes it impossible for plaintiffs to know or bring before the court all Negro students who have applied and who have been denied admission, solely because of race and color."

Certainly, such statement cannot be construed other than as an admission on behalf of appellees that the evidence contained in the record on appeal did not show the existence of persons constituting a class so numerous as to make it impracticable to bring them all before the court, which is prerequisite to the maintenance of a class action under Rule 23 (a), Federal Rules of Civil Procedure. It is not

contended on behalf of appellant that appellees should know or bring before the court all Negro students who have applied and who have been denied admission, solely because of race and color. However, it is contended that the burden was on the appellees to show the existence of a class of Negroes who have applied to the University of Alabama for admission as students and **who were denied admission by appellant** solely because of race and color, the members of which class are so numerous as to make it impracticable to bring them all before the court.

It is submitted that there was a complete failure on the part of appellees to show the existence of a "class" for whose benefit this suit might be maintained.

As stated in the brief filed on behalf of appellant on the appeal of this case (pp. 54-55), while it might be said that the averments of the complaint as last amended, on their face, were sufficient to permit the appellees to maintain this action as a class action, it is submitted that, in view of the evidence introduced on the trial thereof and the failure thereof to show the existence of a class, composed of other Negroes similarly situated, viz., who had made application for admission as students to the University of Alabama and who, while possessing the requisite qualifications for admission, had been denied admission solely on account of their race and color, and that the members thereof were so numerous as to make it impracticable to bring them all before the Court, the District Court erred in holding that this action is properly brought as a class action under Rule 23 (a), Federal Rules of Civil Procedure, and in including in its judgment an injunction against denying "others similarly situated" the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color.

Wherefore, appellant prays that the opinion and judgment of this Court entered in this case on December 30, 1955,

be recalled and that a rehearing be granted to consider the errors urged above, and on final hearing that a judgment be entered reversing the judgment of the District Court and remanding the case to the District Court with instructions to eliminate from its opinion its conclusion that this action is properly brought as a class action and from its judgment the class feature thereof.

Appellant further prays for all orders and decrees necessary and for general and equitable relief.

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and

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This is to certify that a copy of this petition for rehearing has been mailed by United States Mail, postage prepaid, to Arthur D. Shores, Masonic Temple Building, Birmingham, Alabama, one of the attorneys for appellees, on this the.....day of January, 1956.

.....
Attorney for Appellant.